IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 11, 2007 Session

MARGUERITE EVANS CHITWOOD AKERS v. MICHAEL TODD AKERS

Appeal from the Chancery Court for Williamson County
No. 29715 Timothy L. Easter, Chancellor

No. M2006-01130-COA-R3-CV - Filed on June 20, 2007

In this divorce proceeding, both parties appeal the trial court's classification and division of the marital estate. Wife also appeals the trial court's failure to award her an annulment. The judgment of the trial court is affirmed in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

Phillip L. Davidson, Nashville, Tennessee, for the appellant, Marguerite Evans Chitwood Akers.

George Copple, Ben H. Cantrell, Nashville, Tennessee, for the appellee, Michael Todd Akers.

OPINION

This appeal concerns the classification and division of a sizable marital estate and the alleged failure of the trial court to award Wife an annulment after a five year marriage. Mr. Michael Akers and Mrs. Marguerite Akers met in July 1997 and shortly thereafter, Mr. Akers went to work for Mrs. Akers at her company. The parties married in June 1998, at which time Mr. Akers was 28 years old and Mrs. Akers was 39 years old.

Prior to the marriage, Mrs. Akers started a business, Hemophilia Access, Inc. (HAI), which facilitated the timely delivery of hemophilia blood products to hemophiliacs. Mrs. Akers operated the business from her home at 9857 Clovercroft Road. At all times during the marriage, Mrs. Akers was the sole owner and President of HAI, performing all of the primary functions for the company and the only person authorized to sign accounts for HAI. The trial court determined that at the time of the parties' marriage, HAI was valued at $2,000,000.00.

Also prior to the marriage, Mr. Akers and his mother purchased a house at 9849 Clovercroft Road. Mr. and Mrs. Akers agreed to move HAI's operations from Mrs. Akers' personal residence

to that location. Mr. Akers' net worth at the time of marriage was $42,000.00, and his yearly income was approximately $30,000.00.

Shortly after the marriage, Mr. Akers began to take control of the parties' finances. Mr. Akers also started to refer to himself as the co-owner of HAI although his title at HAI was Director of Marketing. Mr. Akers became interested in valuing HAI and he approached Mrs. Akers about the possibility of selling the business. Due to Mr. Akers' insistence, the parties commissioned Geneva Companies to conduct a corporate financial evaluation of HAI in September 1999. The report concluded that Mrs. Akers was the owner of HAI and that her primary functions were the overall management of HAI as well as involvement in the sales and project management aspects of the business. On January 7, 2002, Mrs. Akers sold HAI to Curative Health Services for $2,650,000.00.[1] Both of the parties signed non-compete agreements and accepted employment with the buyer after the sale. Curative paid Mrs. Akers $180,000.00 per year while paying Mr. Akers $28,730.00 per year.

In March 2002, Mr. Akers opened a bank account in the name of Akers Holding Company with the monies derived from the sale of HAI. Mr. Akers then began purchasing properties in joint tenancy for the parties with the funds in the account. The properties included: York Road valued at $448,750.00; 7657 Nolensville Road valued at $390,000.00; Paw Paw Springs valued at $20,000.00; and McCanless Road valued at $90,000.00. The parties also quit claimed their separate properties on Clovercroft Road into their joint names as tenants by the entireties. Eventually, all of the properties' mortgages were paid off with funds received from the sale of HAI.

On September 11, 2003, Wife filed a Complaint for divorce or annulment, alleging that Mr. Akers had engaged in inappropriate marital conduct. During the marriage and the pendency of divorce, the parties had forty-eight different bank accounts. As a result, the trial court appointed a Special Master to assist the court in classifying the marital and non-marital assets and valuing the estate. On April 28, 2006, the court entered a final decree of divorce and divided the parties' real and personal property. The court found that the monies in the parties' accounts had been so inextricably commingled and transmutated that all but two accounts had become marital property. The court thereafter awarded Mr. Akers $312,689.22 and $408,118.00 in real property. Having found that Mrs. Akers had contributed substantially more to the marital estate, the court awarded Mrs. Akers the two non-marital accounts, the withheld shares resulting from the sale of HAI, $881,308.69, and $1,526,500.00 in real property. Both parties appeal the classification and division of the marital estate. Mrs. Akers also challenges the trial court's failure to award her an annulment.

I. ANNULMENT

Mrs. Akers first argues that the trial court erred in refusing to annul the marriage. "Tennessee protects the institution of marriage by presuming that regularly solemnized marriages are valid.

[1] At the time of sale, Mrs. Akers signed an indemnification agreement allowing Curative to withhold 97,020 shares of stock in order to protect the buyer from a medical fraud investigation being conducted in Florida against HAI.

Thus, persons challenging a marriage must provide cogent and convincing evidence that the marriage is invalid." *Aghili v. Saadatnejadi*, 958 S.W.2d 784, 789 (Tenn.Ct.App.1997) (internal citations omitted).

> A marriage is voidable from the beginning (1) when either party was insane; or (2) the complainant was under duress; or (3) was under the age of consent; or (4) when the consent was obtained by force, or fraud, and was given by mistake; or (5) when the defendant was impotent; or (6) when the woman was pregnant by another man without the knowledge of the complainant; or (7) when, for any other reason, the marriage was not binding on the complainant....

Coulter v. Hendricks, 918 S.W.2d 424, 426 (Tenn.Ct.App.1995) (quoting 2 *Gibson's Suits in Chancery* § 1147 note 10 (5th ed. 1956) (footnotes and emphasis omitted).

Mrs. Akers' alleged basis for annulment is that Mr. Akers fraudulently induced her to enter the marriage with the purpose of divesting Mrs. Akers of her wealth. Where annulment is sought for fraud, the plaintiff has the burden of showing that the fraud was calculated to induce the marriage, and the plaintiff relied on such inducement. *Masters v. Masters*, 10 N.W.2d 674, 679 (Wis.1961). Mrs. Akers failed to allege any misrepresentations perpetrated by Mr. Akers prior to the marriage which would have fraudulently procured Mrs. Akers' consent to marriage. We therefore find that the trial court properly refused to grant Mrs. Akers an annulment.

II. Classification of Marital Property

The primary basis for the parties' appeal pertains to the trial court's classification and division of the marital estate. When dividing the marital estate, the trial court must first classify the parties' property as either separate or marital property. *Flannary v. Flannary*, 121 S.W.3d 647, 650 (Tenn.2003). Because Tennessee is a "dual property" state, *Smith v. Smith*, 93 S.W.3d 871, 875 (Tenn.Ct.App.2002), only property defined as "marital property" pursuant to Tenn. Code Ann. § 36-4-121(b)(1)(A) may be included in the marital estate. "Questions regarding the classification of property as either marital or separate, as opposed to questions involving the appropriateness of the division of the marital estate, are inherently factual." *Church v. Church*, No. M2004-02702-COA-R3-CV, 2006 WL 2168271, at *5 (Tenn.Ct.App. Aug. 1, 2006). Thus, we review a trial court's classification of the marital estate using the standards provided in Tenn.R.App.P. 13(d).

Both parties contend that the trial court erred in the classification of the marital estate. Mr. Akers argues that the withheld Curative shares and two of Mrs. Akers' separate accounts which contain proceeds from the sale of HAI should have been classified as marital property since Mrs. Akers had no intent to maintain these assets as separate property. Mrs. Akers however argues that the parties' joint financial accounts and the real properties titled in joint tenancy should not have been classified as marital property because they were funded and financed solely with Mrs. Akers' separate property and Mr. Akers made no independent contributions thereto.

The dividing line between marital and separate property can often become blurred. *Church*, 2006 WL 2168271, at *5 n. 7. "[C]ourts in Tennessee have recognized two methods by which separate property may be converted into marital property: commingling and transmutation." *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 747 (Tenn.2002). The concepts of commingling and transmutation have been explained by the Tennessee Supreme Court as follows:

> [S]eparate property becomes marital property [by commingling] if inextricably mingled with marital property or with the separate property of the other spouse. If the separate property continues to be segregated or can be traced into its product, commingling does not occur.... [Transmutation] occurs when separate property is treated in such a way as to give evidence of an intention that it become marital property.... The rationale underlying these doctrines is that dealing with property in these ways creates a rebuttable presumption of a gift to the marital estate. This presumption is based also upon the provision in many marital property statutes that property acquired during the marriage is presumed to be marital. The presumption can be rebutted by evidence of circumstances or communications clearly indicating an intent that the property remain separate.

Langschmidt, 81 S.W.3d at 747 (quoting 2 Homer H. Clark, *The Law of Domestic Relations in the United States* § 16.2 at 185 (2d ed.1987)).

The record in this case reveals that the parties maintained approximately forty-eight different financial accounts during the marriage. Although the court sought the expertise of an accounting firm in an effort to separate the marital property from the separate property, the court could only locate two accounts directly traceable to the proceeds from the sale of HAI. And while we agree that undoubtedly much of the monies found in the forty-eight accounts were attributable to the sale of Mrs. Akers' business, Mrs. Akers did not safeguard the HAI sale proceeds' separate nature by segregating the funds from the marital estate. Instead, Mrs. Akers allowed her separate property to become so severely commingled with the marital property and with Mr. Akers' separate property, either by acquiring real property titled in joint tenancy or by making haphazard transfers, purchases and withdrawals from the parties' forty-eight accounts, that we must presume that Mrs. Akers intended to make a gift to the marriage. Mrs. Akers has failed to rebut this presumption by presenting any evidence of circumstances or communications indicating an intent that her property remain separate. *See Tower v. Tower*, No. 02A01-9407-CV-00170, 1995 WL 650131, at *6 (Tenn.Ct.App. Nov. 3, 1995). We therefore can find no basis to exclude the commingled accounts or the real properties titled in joint tenancy from the marital estate.

We likewise can find no basis to include Mrs. Akers' withheld shares from the sale of HAI or her two separate bank accounts in the marital estate. Based on the report of the Special Master, the trial court specifically found that two of Mrs. Akers' accounts were a direct result of the sale of HAI, that the accounts were not inextricably commingled, and that the accounts remained separate and distinguishable from the other marital assets. Similarly, the remaining shares from the sale of HAI which are being withheld pending the outcome of a medical fraud litigation were a direct result

of the sale of HAI and there was no evidence of commingling or transmutation. Therefore, the trial court's classification of the marital estate is affirmed.

III. DIVISION OF MARITAL PROPERTY

The parties next challenge the court's division of the marital estate. After the marital estate has been classified and valued, the trial court should divide the marital property in an essentially equitable manner. Tenn.Code Ann. § 36-4-121(a)(1); *Miller v. Miller*, 81 S.W.3d 771, 775 (Tenn.Ct.App.2001). The division need not be precisely equal in order to be equitable, *Robertson v. Robertson*, 76 S.W.3d 337, 341 (Tenn.2002), nor does each party require a share of every piece of marital property. *Manis v. Manis*, 49 S.W.3d 295, 306 (Tenn.Ct.App.2001). In dividing marital property, the court does not engage in a mechanical process but rather must carefully weigh the pertinent factors provided in Tenn.Code Ann. § 36-4-121(c). *Flannary*, 121 S.W.3d at 650-51. Since the trial court has broad discretion in fashioning an equitable division of the marital estate, the appellate courts afford great weight to its decision on appeal. *Jolly v. Jolly*, 130 S.W.3d 783, 785 (Tenn.2004).

Mr. Akers argues that the trial court's disproportionate division of the marital estate is inequitable and has no basis at law. After careful consideration of the factors provided in Tenn. Code Ann. § 36-4-121(c)[2], we disagree. The marriage in this case was of short duration. However during this short time, Mrs. Akers made substantial contributions to Mr. Akers' employability and increased earning power. Mr. Akers earned $30,000.00 per year prior to the time of marriage but through his employment with HAI, Mr. Akers gained valuable knowledge about medical sales such that in 2003 he earned $177,000 as well as a bonus of $75,000 working for a medical supply company. Mrs. Akers also made significant contributions to the acquisition and appreciation of the marital estate since a substantial portion of the proceeds from the sale of HAI, which would have been separate property but for commingling and transmutation, were deemed marital property. Although Mr. Akers did make some contributions to the marital estate through his salary, carpentry

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[2] Tenn. Code Ann. § 36-4-121(c) provides:

(c) In making equitable division of marital property, the court shall consider all relevant factors including:
(1) The duration of the marriage;
(2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
(3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
(4) The relative ability of each party for future acquisitions of capital assets and income;
(5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
(6) The value of the separate property of each party;
(7) The estate of each party at the time of the marriage;
(8) The economic circumstances of each party at the time the division of property is to become effective;
(9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
(10) The amount of social security benefits available to each spouse; and
(11) Such other factors as are necessary to consider the equities between the parties.

work, and homemaker skills, the testimony adduced at trial showed that Mr. Akers' contributions were minimal compared to those of Mrs. Akers. And while Mr. Akers argues that the court failed to take into consideration his decreased future earning capacity due to his hemophiliac and HIV diagnosis, we believe that the court's property division accurately reflects the parties' individual contributions to the marriage and leaves Mr. Akers in a far better financial position than that which he enjoyed prior to the marriage.

Mrs. Akers contends that Mr. Akers is not entitled to any of the property acquired during the marriage since he made no independent contribution to the marital estate and because Mrs. Akers was under duress when she allowed Mr. Akers to use her separate funds to purchase properties for the parties in joint tenancy. As we previously discussed, Mr. Akers did make some contributions to the marital estate through his salary, carpentry work, and homemaker skills and we believe that the trial court's property division properly accounts for each parties' relative contributions. We also find no merit in Mrs. Akers' argument that she agreed to have the properties titled in both the parties' names only under duress. We have defined duress as:

> an unlawful restraint, intimidation, or compulsion of another to such an extent and degree as to induce such other person to do or perform some act which he is not legally bound to do, contrary to his will and inclination. *Johnson v. Ford,* 147 Tenn. 63, 86, 245 S.W. 531 (1922). The alleged coercive event must be of such severity, either threatened, impending or actually inflicted, so as to overcome the mind and will of a person of ordinary firmness. *Fogg v. Union Bank,* 63 Tenn. [4 Baxter] 530, 535 (1830).

McClellan v. McClellan, 873 S.W.2d 350, 352 (Tenn.Ct.App.1993) (quoting *Fed. Deposit Ins. Corp. v. Ramsey*, 612 F.Supp. 326, 328 (E.D.Tenn.1985).

Mrs. Akers has alleged no coercive event which forced her to act contrary to her will. Therefore, the trial court's division of the marital estate is affirmed.

IV. CONCLUSION

The abbreviated treatment of issues raised on appeal in this case is in tribute to and not in disparagement of the prodigious efforts of the trial court and the Special Master as reflected in this voluminous record.

Taking the allegations of the Complaint as true, Mrs. Akers had a profitable business before her marriage to Mr. Akers on June 28, 1998. It is alleged that from the beginning, Mr. Akers embarked upon a course designed to convert Mrs. Akers' assets to his own use. He took control of her business until December of 2000, at which time she filed suit for divorce but then immediately reconciled with Mr. Akers upon the representations of the figurative leopard that he would change his spots. His letter to her inducing the reconciliation states:

> My involvement with the company was to help in any way possible so my wife would succeed. I do not now nor have I ever had the desire to start a company such as the one she has. I will not use the knowledge I have learned to start my own business. It was never my intention to make my wife feel as though this was my intention. I only wanted to do my best so her company would succeed and provide a good life for her and my family. So I now state I Michael Akers will not start a business in any way similar to my wife's business Hemophilia Access, Inc. This is to be considered legal and binding, and has no expiration date. I will never do this and never wanted to.

This letter is signed by Michael T. Akers and marked "received 12/21/2000 MCA."

It was following this reconciliation, months before the sale of the business, that the level of the tangled web of interwoven bank accounts, investments, and other alleged machinations occurred.

The trial court was then belatedly called upon to unscramble an egg. The trial court had the benefit of an exhaustive report from the Special Master as to all matters of property to which no objections were made.

> The trial judge's goal is to divide the marital property in an essentially equitable manner. A division is not rendered inequitable simply because it is not precisely equal, or because each party did not receive a share of every piece of marital property. *Kinard v. Kinard*, 986 S.W.2d 220, 230 (Tenn.Ct.App.1998). Dividing a marital estate is not a mechanical process but rather is guided by considering the factors in Tenn. Code Ann. § 36-4-121(c). Trial judges have wide latitude in fashioning an equitable division of marital property, and appellate courts accord great weight to a trial judge's division of marital property. *Id.* Thus, we will ordinarily defer to the trial judge's decision unless it is inconsistent with the factors in Tenn. Code Ann. § 36-4-121(c) or is not supported by a preponderance of the evidence. *Id.* In this case, where the Trial Court has adopted the findings of a Special Master, we will defer to the Trial Court if there is any material evidence to support its findings. *Long*, 957 S.W.2d at 828.

Manis, 49 S.W.3d at 306.

Accordingly, the judgment of the trial court is affirmed in all respects and the costs of appeal are assessed to Appellant.

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WILLIAM B. CAIN, JUDGE